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Responding to Crime In a Different Way

Marquette's Restorative Justice Initiative

BY SONYA BICE



he modern concept of restorative justice, seen by some of its advocates as a more effective and humane approach to crime and conflict than the predominant U.S. norms, has been experimented with in various contexts both in

the United States and abroad for about 30 years. Courses in the theory and practice of restorative justice—applications of which are also known as victim-offender reconciliation programs (VORP) and victim-offender mediation (VOM)—can be found at law schools around the country.

Marquette Law School, however, is the only law school to have created a comprehensive program dedicated to the study and application of restorative justice principles. Under the leadership of former Wisconsin Supreme Court Justice Janine Geske, Distinguished Professor of Law, Marquette's Restorative Justice Initiative offers students courses and clinical experiences, serves as a clearinghouse on restorative justice scholarship and research, and collaborates with leaders in the movement, including Dr. Mark Umbreit, executive director of the Center for Restorative Justice & Peacemaking based at the University of Minnesota.

Restorative justice proponents reject reliance on only the retributive justice model—what Geske has called the “trail ’em, nail ’em, jail ’em” approach—and seek instead in appropriate circumstances to shift the focus from the offender to the victim, from the offense committed to the harm done. Restorative justice practices, which are rooted in many indigenous cultures and in varied religious traditions, have applications in a wide spectrum of conflicts, in elementary school classrooms, in criminal courts, and in lands torn by civil war.

The starkest contrast between the two models can be seen in the choice facing Ugandans, who have for decades suffered grotesque brutality at the hands of a rebel group. The country is divided on the way to hold the four rebel leaders accountable for war crimes. The International Criminal Court in The Hague has issued indictments, but the rebels want to participate in a tribal reconciliation ritual. In the ritual, called a *mataput*, the offender faces the person he has wronged, admits responsibility for the harm, and

shares a meal with the victim's family. Exhausted by endless violence, many of those who have suffered the most have said they would prefer the tribal reconciliation process.¹

The application of restorative justice practices in the U.S. criminal justice system, which Geske says was once viewed as “a wacky idea,” has now gained respect in legal and academic circles, bolstered by reams of empirical research showing high rates of satisfaction among participating victims. There is also some evidence of lowered recidivism rates for participating offenders.²

“Restorative justice is a movement that is truly developing all over the world, and Marquette Law School is now playing a leadership role in it,” Umbreit says. “This is a very bold step for the Law School to take.”

“We do have the most vibrant program in the country,” Geske notes. “I get calls constantly from law schools around the country. We have students choosing to come here because of the program.”

The establishment of the Restorative Justice Initiative at Marquette comes at a crucial juncture for the movement. In recent years some of its practices have gained mainstream acceptance: the ABA endorsed VOM in 1994,³ and in 2000 Wisconsin became one of the first states to implement formal restorative justice practices in juvenile justice and criminal justice systems.

The work of Marquette Law School's Restorative Justice Initiative gained momentum with the recent award from the federal government of an almost \$400,000 grant to develop an antigang pilot program, to be implemented in police districts on the near north side and the south side of Milwaukee. The program incorporates restorative justice principles to fight the destruction of neighborhoods by gang activity. The grant is part of a larger federal antigang effort being implemented in more than 100 cities across the country. Leading the Law School's work on the grant, Geske hired Paulina Jasso and Ron Johnson to work as coordinators in Police Districts 2 and 5, respectively; their role is to coordinate and focus resources in the two communities. They will also convene restorative justice circles to bring together community members, former gang members, police officers, and prosecutors to increase understanding of ways gang activity deeply harms the community.

“I guess it’s my dream to energize neighborhoods, to take back neighborhoods,” Geske says. She finds inspiration in the successes of programs such as the Red Hook Community Court in Brooklyn, New York, an experimental court housed in a center offering an array of community services, which has won accolades for innovative practices. Judge Alex Calabrese of the Red Hook Community Court was the keynote speaker at the Restorative Justice Initiative’s annual conference in November.

But even as they seek a bigger role for restorative justice programs, some advocates fear that being embraced by the justice system could be the kiss of death.

“On the one hand, recognition by and active collaboration with the formal justice system is vital to implementing the underlying vision of restorative justice,” Umbreit has written in the *Marquette Law Review*. “On the other, such widespread growth . . . has made the movement increasingly vulnerable to being co-opted by the very justice systems that were initially so critical of its existence.”⁴

Umbreit has posed several questions about the movement’s future: Is restorative justice in fact about developing an entirely new paradigm of how American criminal justice operates at a systemic level, or is it a set of processes, specific principles, and practices that can operate within conventional criminal justice systems? Will restorative justice be marginalized through being required to deal with only the most minor types of criminal and delinquent offenses, many of which would self-correct on their own?

Geske and restorative justice

Geske was drawn to restorative justice’s focus on truly understanding and repairing harm, a far cry from what she saw in the day-to-day operation of the state criminal justice system. “While sitting in criminal court for nine years,” she has written, “I experienced both the successes of our criminal justice system as well as its failures in bringing restoration to victims and communities harmed by crime.”⁵ She calls restorative justice’s victim-centered approach “a means to address those failures through the

Theory meets

Restorative justice applications that involve Marquette law students and alumni take place in many settings inside and outside of the criminal justice system, from bright elementary school classrooms to the bleak confines of Green Bay’s overcrowded maximum security prison—even to war-weary countries on the other side of the world.

Schools

Christine Agaiby, L’05, is the restorative justice manager for Alternatives, Inc., where she oversees the peer jury programs in 27 public high schools in Chicago. In the programs, a student who admits to a violation of the school district’s Student Code of Conduct is given the opportunity to go before a peer jury. “When they come into the circle, they often take on an attitude that there’s nothing wrong with what they did,” Agaiby explains. “For example, they’ll say there’s nothing wrong with using bad language in class. And the jurors, who are their peers, talk to them: ‘Think about the reasons why using bad language is wrong. Could you speak like that at home? How do you think the teacher feels when you use those words in class, and what kinds of safety issues do you create when those words are thrown around?’ The jurors can’t move on until the student accepts accountability for his or her actions. And they put together an agreement that gets the student back involved in the community of the school, and they relate that agreement to the offense.”

Students who don’t choose the peer jury route face a standard suspension.

“What the disciplinarian would do would be a very punitive model,” Agaiby says. “In the restorative model, we address the specific offense or crime and also bring in the victim so that the victim feels restored.”

Agaiby attended the restorative justice program at the Green Bay Correctional Institution while a law student at Marquette. “That was my first observation

practice



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— Christine Agaiby, L’05

of real restorative justice practices, and those three days were the best thing I did in law school,” she says. “It was so amazing. It changed my life. I still think very often about those prisoners and that whole experience.”

Prisons

In Green Bay, at the maximum security state prison which houses more than 1,000 offenders, Professor Janine Geske brings prisoners face to face with crime victims to hear firsthand the life-shattering consequences of violent crime. It is a part of the prison’s Challenges and Possibilities Program, an intensive 20-hour course available to small groups of prisoners.

Where victims request it, direct mediation between offender and victim can be arranged, but more often the dialogues involve “surrogate victims” who have experienced harrowing losses—children killed by drunk drivers, spouses and parents killed in senseless violent crimes. The powerful and moving conversations, Geske says, result in a measure of healing for both victims and offenders that is all but impossible to find in the conventional system. “The key to healing is, first, to truly understand the harm,” Geske says. “And it’s not because the offenders are going to get out any earlier as a result—they aren’t.”

Global hot spots

Erika Jacobs, L’06, traveled to South Africa while a law student to see how restorative justice principles apply in human conflicts where the scale of the individual harms is almost beyond comprehension.

“I took field notes as staff members met with ex-combatants who were seeking resolution from the struggle, either between members of their own liberation party or with the South African government,” she says. “I was able to sit in on healing circles between ex-combatants as they told stories of torture and betrayal by fellow combatants.”

Jacobs interned at the Centre for the Study of Violence and Reconciliation in South Africa. The Restorative Justice Mediation Project for Human Rights Violations helps survivors and their former enemies begin to heal the deep wounds of South Africa’s apartheid era. The organization employs psychologists, lawyers, criminologists, and sociologists, and it operates a trauma clinic, where counseling is available to victims and perpetrators of violence. The Centre for the Study of Violence and Reconciliation is a nongovernmental entity; the South African government’s own approach to healing the nation, the Truth and Reconciliation Commission, is viewed, Jacobs says, with mixed emotions by South Africans. “Many people who fought in the struggle did not trust the Truth and Reconciliation Commission to solve or heal all the wounds and problems that surrounded the struggle. People believed the Truth and Reconciliation Commission helped the country as a whole in avoiding a major conflict after the fall of apartheid but looked to more localized organizations to help resolve conflicts on a more personal level.” •

guidance of professionals who understand how best to address the needs of those who have been harmed.”⁶

After years on the bench where she saw the worst people could do to each other, Geske brings a capacity for deep compassion and intense spirituality to her work with shattered victims and with offenders who have committed reprehensible acts. Occasionally she facilitates face-to-face meetings between a violent offender and a victim of that offender’s crime; one such meeting, between a Wisconsin woman whose brother was gunned down and the man who, as a teenager, had pulled the trigger, was featured in an edition of *Dateline NBC*.⁷

Geske tells moving stories of the forgiveness and psychological healing she has witnessed in the Green Bay Correctional Institution’s Challenges and Possibilities Program, where participating prisoners meet with family members of victims of violent crime and come to a new understanding of the profound suffering their crimes caused.

“Many people believe restorative justice has a deep spiritual component,” she says. “There is definitely something special that happens in these meetings.”

Defining restorative justice

Howard Zehr, one of the movement’s early leaders and the author of a key text in restorative justice theory,⁸ defined restorative justice as a fundamentally different view of justice. Where the conventional U.S. criminal justice system asks questions related to the offender (What law has been broken? Who did it? What does he or she deserve?), the restorative justice approach asks questions related to the victim (Who has been hurt? What are his or her needs? Whose obligations are these?). While restorative justice does not reject traditional punishment such as incarceration per se, many advocates would give it a much more limited role, typically as a last resort when restorative justice approaches have failed.

Geske defines restorative justice as “a victim-centered approach to holding offenders accountable for the harm they have caused.” That definition provides the elements of the restorative process: a victim, an offender, accountability, and reparations.

Three common types of restorative justice dialogue occur in response to a specific offense:

- victim-offender mediation, entailing direct mediation between victim and offender, guided by a professional mediator;
- group conferencing, which involves the victim and offender as well as additional community members;
- circles (also called peacemaking circles, repair of harm circles, and sentencing circles), which can include the wider community and involve a process using a “talking piece” (this signifies that the person holding the piece is the only one permitted to speak).

All three practices, as applied in a criminal justice setting, are used in the subset of cases where an offender has been apprehended, has admitted causing the harm, and has taken responsibility for the actions—and the victim chooses to try the restorative justice approach instead of, or in addition to, the conventional approach.⁹

Offenders benefit, restorative justice proponents say, from being forced to deal directly with the person who has been harmed; victims benefit from being permitted to talk directly with the offender; and the system benefits both from lowered caseloads and from lowered recidivism rates.

A differing view

Advocates of restorative justice are candid about some of the unintended negative consequences of poorly executed programs and are concerned that, as the movement moves into the mainstream, it risks losing its philosophical bearings. But to some critics of restorative justice, the movement’s philosophical underpinnings are what is problematic.

In *Compulsory Compassion: A Critique of Restorative Justice*, Annalise Acorn, a law professor at the University of Alberta, regards it as necessary to “deconstruc[t] the rhetoric” of restorative justice, and to take issue with what her book characterizes as restorative justice’s fundamental assumptions: “that we can trust wrongdoers’ performances of contrition; that healing lies in a respectful, face-to-face encounter between victim and offender; and that the restorative idea of right-relation

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holds the key to a reconciliation of justice and accountability on the one hand, with love and compassion on the other.”¹⁰

Another critic cautions that restorative justice principles about community involvement become harder to implement as the community is harder to define: “[C]ommunity’ is a very dangerous concept. It sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse.”¹¹

At risk of being a victim of its own success

As committed as she is to the underlying principles of restorative justice, Geske remains wary of the potential for restorative justice principles to be implemented in piecemeal fashion; in the process, she fears, its distinctive focus on victim needs and accountability to the community will be sacrificed. “A lot of people have latched onto it as

another name for rehabilitation, and in some programs, the victim and community are being washed out,” she says.

Umbreit says he has seen some programs “retrofitting restorative justice terminology”—and nothing more—to existing programs.

For Geske, the mark of a restorative justice program is simple. She looks for the magic word: *victim*. She has seen detailed descriptions of programs that purport to be restorative justice programs, where, she says, “the word *victim* never appeared once.”

Though passionate about its potential, Geske is cognizant of the dangers of restorative justice principles being applied by poorly trained people, however well-meaning, in volatile situations. “Another fear, and it’s a valid fear, is that if the processes are not done well, victims are revictimized,” she says. “All sorts of bad things can happen.”

Some see restorative justice as colliding with social and

political realities that they believe are driving the current U.S. system to be, if anything, more, not less, punitive. In recent decades, incarceration rates have skyrocketed. Michael O’Hear, Professor of Law at Marquette and a nationally recognized expert on sentencing issues, points out that a system that “incarcerates Americans at rates that are unrivaled among western democracies” still is criticized by a majority of Americans in surveys as not dealing “harshly enough” with criminals.¹²

Umbreit knows that the work of restorative justice advocates will take time and patience. Ultimately, he thinks people can be persuaded. He has seen it happen.

“Often when you read restorative justice stuff or hear people talk, you get this kind of romantic version of the

community. The fact is, there are many communities—many would suggest most communities—that want more vengeance, more punishment,” Umbreit says. “Working with, quote, the community, unquote, is a messy issue. Unless you go in and plant seeds, and work with individuals and small groups to help plant and nourish restorative principles and practices, I think the exact opposite of restorative justice could happen in many settings.

“On the other hand, what I have seen over and over again is that we all have the dark side of us and the more open side. When you work with communities and people, restorative justice tends to tap into that higher self.” •

Sonya Bice will graduate from Marquette University Law School in May 2008.

1. See *Uganda and Rebels Agree to Third Phase of Five-Stage Peace Deal*, N.Y. TIMES, July 1, 2007; Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1.
2. See Mark Umbreit, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQUETTE L. REV. 251 (2005) (providing an excellent overview of the movement nationally and globally, summarizing the extensive empirical research on certain restorative justice practices, and identifying some unintended negative consequences as well as some of the challenges that arise as restorative justice practices are integrated into the conventional criminal justice system).
3. Criminal Justice Policy on Victim-Offender Mediation/Dialogue, 1994 A.B.A. RES., available at <http://www.vorp.com/articles/abaendors.html>.
4. Umbreit, *supra* note 2, at 261.
5. Janine Geske, *Why Do I Teach Restorative Justice to Law Students?*, 89 MARQUETTE L. REV. 327, 327 (2005).
6. *Id.*
7. *A Victim’s Voice: 21 Years Later, a Woman Confronts Her Brother’s Killer. Could a Face-To-Face Meeting Help Bring Closure?*, Aug. 6, 2006, *Dateline*, NBC News (transcript at <http://www.msnbc.msn.com/id/14190842/>).
8. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002). For an articulation of the underlying philosophy of restorative justice principles by two of the movement’s best-known proponents, see HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990), and JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2001).
9. Of course, some crimes affect multiple victims, and differences sometimes arise as to the best way to repair the harm. Cf. David Doege, *A Plea for Leniency, a Split in the Family: Three-Time Drunken Driver Seeks Lesser Sentence; Some of Victim’s Relatives Agree*, MILWAUKEE JOURNAL SENTINEL, Feb. 19, 2007, at A1.
10. ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* (2004) (publisher’s summary).
11. Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 343. See also Ellen Waldman, *Healing Hearts or Righting Wrongs? A Meditation on the Goals of “Restorative Justice,”* 25 HAMLIN J. PUB. L. & POL’Y 355, 362 (2004) (“[R]estorative procedures are lauded and sold to public agencies and law enforcement bureaus because they facilitate psychological growth and healing, not because they make victims whole in concrete material ways. While this trade-off may be sensible when dealing with the minor misdemeanor and property crimes for which restorative justice procedures are generally reserved, it is more problematic when extended to crimes of greater scope and magnitude.”); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STANFORD L. REV. 751 (2000) (comparing the systemic problems of restorative justice and VOM with the systemic problems of the conventional criminal justice system).
12. Michael O’Hear, *Is Restorative Justice Compatible With Sentencing Uniformity?*, 89 MARQUETTE L. REV. 305, 305–06 & n.8 (2005).

A restorative justice experiment in the Milwaukee DA's office:

Perspectives from defense counsel and prosecutor

While seeking better ways to meet the needs of crime victims he met while working in the consumer fraud unit, Milwaukee County Assistant District Attorney David Lerman discovered the groundbreaking program in the district attorney's office in Des Moines (Polk County), Iowa, which has been in place since 1991. Lerman obtained some funding and got the Milwaukee County Community Conferencing Program (CCP) off the ground in 2000. While other cities offer restorative justice programming for juvenile offenders, Lerman relates, Milwaukee County and Polk County are the only counties in the country that involve both juvenile and adult offenders in restorative justice programs that operate in the district attorney's offices. Lerman is currently focusing on restorative justice applications in Milwaukee Public Schools.

"The conferencing model is the main piece of what we do," Lerman says. "That started off in adult court six years ago, and we started in the juvenile court in autumn of 2004. There's a subsidiary of the conferencing program which we call community accountability circles. Those are drug cases where the victim is the broad community. We've also done work in schools. The goal there is to introduce the concept of restorative justice broadly, doing circle work as a preventive technique for discipline issues."

Marquette law students facilitate some of the conferences. CCP Program Manager Erin Katzfey follows up on referrals, recruits volunteers to facilitate conferences, and monitors the offenders through the successful completion of the agreements, keeping judges and assistant district attorneys informed of the status of the cases. "We get about 150–160 referrals a year and do about 80 conferences a year in the

adult program," she says. Though the program is ambitious, it represents a tiny fraction of Milwaukee's annual caseload, which consists of some 10,000 misdemeanors, 12,000 criminal traffic offenses, 7,000 felonies, and 2,500 juvenile cases. The Des Moines (Polk County) Victim Offender Reconciliation Program (VORP), which considers all crimes except domestic violence eligible for VORP sessions if the victim wishes, is substantially larger; it conducts more than 1,000 sessions a year.

In Milwaukee, the adult program serves offenders either before charging or before sentencing. A separate program for 17-year-olds facing felony marijuana charges allows those who complete the agreement to walk away with a clean record.

"I like thinking about it in terms of a toolbox, and in a forward-thinking prosecutor's office, this should be one of the tools present and available because it really does provide a service to victims who want to have a real hands-on approach to dealing with the trauma and distress of what happened to them," Lerman says. "Secondly, as a prosecutor's office, we're supposed to be engaged in protecting public safety. We're not talking about totally ridding the criminal justice system of trials or prisons, but there are many offenders for whom this approach can be far more beneficial, and we know this because our recidivism numbers show that people who participate in restorative programs are half as likely to reoffend."

The community conferencing program shares some characteristics with the common prosecution practice of diversion or deferred prosecutions for first offenses. But Lerman says conferencing brings added value. "Deferred prosecutions are fine, but because they don't

involve the victim and they don't involve the community, there can be a lot of missed opportunities. This process is using crime as a hook to create communities of care—to get people talking again around civic issues.

“At some level,” he says, “this work is about helping modern, urban America recreate what it means to be in a community. And, by extension, what it means to be in a democracy.”

Lerman, a veteran prosecutor who has written extensively about restorative justice in the criminal justice system, has been successful in keeping the program funded, but it has always been on a year-to-year basis. “For this work to ultimately succeed in a prosecutor’s office, it can’t be viewed as an add-on,” he says. “It has to be viewed as part of what goes on in the way we engage in the business of justice.”

Defense attorney Jonathan C. Smith, L’95, with the Milwaukee firm of Kohn & Smith, has attended CCP sessions with clients. He speaks highly of the program and says that his clients who have been referred to the program are grateful for the chance to show that they are worthy of a second chance at a clean record. He regards the CCP as having a much more “therapeutic or rehabilitative effect” than deferred prosecution agreements, which are, in any event, rarely to be had in Milwaukee County.

One frustrating aspect to the program, though, is what he called “the luck-of-the-draw aspect.” Clients who are first referred to the program do not necessarily make it in, even if they want to. It all hinges on the victim’s willingness to participate.

In one of Smith’s cases involving a defendant charged with theft, the victims were actually willing to fly in from out of town to participate in the conference, giving the offender, a young woman, the opportunity

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to pay restitution and have a second chance at a clean record.

But in another, a young man charged with a hit and run that resulted in property damage was referred to the program but denied when the victims declined to be involved. “The back story to this was that this young man had previously been the victim of a carjacking,” Smith says. “In fact, he still had bullet fragments in his

head and shoulder.” So when a car started following him late one evening as he drove home from work, he panicked, ran traffic lights, and hit two vehicles.

When the case was referred to the CCP, the victims, Smith says, “didn’t want any part of it.” His client was devastated. Had he completed the CCP successfully, he would have had a citation as opposed to a criminal conviction. “He had such hope. He really didn’t want a criminal record.

“That case saddened me. Does it seem fair? No. Quite frankly, my opinion would be that if a case is deemed worthy of participation in that program, we could have a fallback such as a diversion agreement if the victim opted not to be involved.”

That’s a situation that appears to occur with some regularity. Lerman’s office compiled statistics on reoffense rates of offenders who went through the program as compared to those who were referred to the program but did not end up participating because the victim chose not to. The reoffense rate for the participants was 20.8 percent; the reoffense rate for the nonparticipants was 42.5 percent.

Nevertheless, Smith, a self-described “law-and-order Republican,” sees the CCP as a small ray of light in an otherwise disproportionately punitive justice system. “We have a problem,” he believes. “We are ending up branding too many people as criminals. We are locking up a whole host of people who have no business being locked up.” •